Supreme Court, U. S.
FILED
SEP 11 1980
MICHAEL RODAK, JR., CLER

80-138

No. .....

In The

Supreme Court of the United States

October Term, 1980

DEAN VANDERLINDEN, EXECUTOR OF THE ESTATE OF W. F. VANDERLINDEN, DECEASED,

Appellant,

vs.

RICHARD VANDERLINDEN AND RICHARD VANDERLINDEN, EXECUTOR OF THE ESTATE OF AGATHA VANDERLINDEN, DECEASED,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF IOWA

APPELLANT'S REPLY TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

GALLAGHER, LANGLAS & GALLAGHER, P. C.
405 East Fifth Street
Waterloo, Iowa 50704
Tel. (319) 233-6163
By: EDWARD J. GALLAGHER, JR.
EDWARD J. GALLAGHER, III

MARTIN, KEITH & PEDERSEN
First Federal Savings Building
Waterloo, Iowa 50704
Tel. (319) 235-9212
By: MICHAEL M. PEDERSEN
Counsel for Appellant.

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

TABLE OF CONTENTS

Pages

Appellant's Reply to Appellee's Motion to Dismiss or Affirm Decision of the Iowa Supreme Court. 1

Argument:

I. Appellant has properly challenged the validity of the state statute to warrant a direct appeal from the decision of the Iowa Supreme Court. 1

II. This appeal presents a justiciable case or controversy. 4

III. The notice procedure prescribed by the court in the Della Vanderlinden conservatorship proceedings violated due process of law. 6

IV. Appellee's motion misstates the record. 7

V. The Iowa Court of Appeals erred in deciding this case on the basis of collateral attack; and, moreover, such issue is not one independent from the Federal issue of violation of due process of law. 8

VI. In the event the court finds that an appeal pursuant to 28 U. S. C. Section 1257 (2) is improper, appellant states that writ of certiorari pursuant to Section 28 U. S. C. 1257 (3) should be granted. 8

Conclusion 9

CITATIONS CITED

CASES:

Abie State Bank v. Bryan, 282 U. S. 765, 51 S. Ct. 252, 75 L. Ed. 690 (1931) 8

CITATIONS CITED—Continued

Pages

B. dy v. Ruby, 267 N. W. 2d 902 (Iowa 1978) 2

Fiske v. Kansas, 274 U. S. 380, 47 S. Ct. 655, 71 L. Ed. 1108 (1927) 3

Flanders v. Waterloo Community School District, 217 N. W. 2d 579 (1974) 3, 4

Gray v. Lukowski, 241 N. W. 2d 35 (Iowa 1976) 5

Harrington v. City of Keokuk, 258 Iowa 1043, 141 N. W. 2d 633 (1966) 4, 5, 6

Huffman v. Pursue, Ltd., 420 U. S. 592, 95 S. Ct. 1200, 43 L. Ed. 2d 482, Reh. Den., 421 U. S. 971, 95 S. Ct. 1969, 44 L. Ed. 2d 463 (1975) 3

In Re Estate of Roedell, 253 Iowa 438, 443, 112 N. W. 2d 842, 845 (1962) 5

Japan Line, Ltd. v. County of Los Angeles, 441 U. S. 434, 99 S. Ct. 1813, 60 L. Ed. 2d 336 (1979) 3

Mullane v. Central Hanover Bank & Trust Company, 339 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 2d 865 (1950) 3, 6, 7

Mutual Life Insurance Company v. McGrew, 188 U. S. 291, 23 S. Ct. 275, 47 L. Ed. 480 (1903) 2

Robinson v. Hanrahan, 409 U. S. 38, 93 S. Ct. 30, 34 L. Ed. 2d 47 (1972) 9

Rosenberg v. Jackson, 247 N. W. 2d 216, 218 (Iowa 1976) 8

CITATIONS CITED—Continued

Pages

Roshek Realty Company v. Roshek Brothers Company, 249 Iowa 349, 356, 87 N. W. 2d 8, 13 (1957) 5

Schroeder v. City of New York, 371 U. S. 208, 211, 83 S. Ct. 279, 281-282, 9 L. Ed. 2d 255, 258 (1962) 3

Schutz v. Jordan, 141 U. S. 213, 11 S. Ct. 906, 35 L. Ed. 705 (1890) 5

Sherwood v. Nissen, 179 N. W. 2d 336 (Iowa 1970) 2

CONSTITUTION:

U. S. Constitution, Article III, Section 2 4

U. S. Constitution, Fourteenth Amendment 2, 7

STATUTES:

Section 633.40, 1971 Code of Iowa 2, 4, 6

Section 633.389, 1971 Code of Iowa 2

28 U. S. C. § 1257 (2) 1, 3, 4, 8

28 U. S. C. § 1257 (3) 1, 8

OTHER AUTHORITIES:

58 Am. Jur. 2d, Notice, 532 at 513 4

66 C. J. S., Notice, Section 21 (a) at 674 4

RULES:

Rule 237, Iowa Rules of Civil Procedure 2

Rule 56, Federal Rules of Civil Procedure 2

COMES NOW, the appellant, Dean Vanderlinden, Executor of the Estate of Della Vanderlinden, deceased, and hereby replies to appellee's Motion To Dismiss Or Affirm, stating as reasons therefore the following:

I. Appellant has properly challenged the validity of the state statute to warrant a direct appeal from the decision of the Iowa Supreme Court.

II. This appeal presents a justiciable case or controversy.

III. The notice procedure prescribed by the court in the Della Vanderlinden conservatorship proceedings violated due process of law.

IV. Appellee's motion misstates the record.

V. The Iowa Court of Appeals erred in deciding this case on the basis of collateral attack; and, moreover, such issue is not one independent from the Federal issue of violation of due process of law.

VI. In the event the court finds that an appeal pursuant to 28 U. S. C. Section 1257 (2) is improper, appellant states that writ of certiorari pursuant to Section 28 U. S. C. 1257 (3) should be granted.

ARGUMENT POINT I.

Appellant has properly challenged the validity of state statutes to warrant a direct appeal from the decision of the Iowa Court of Appeals.

Appellee has challenged the timeliness of the raising of the Federal question by appellant. This Court has long held that the proper time to assert a Federal ques-

tion is in the trial court, whether such be by pleadings, motion, exception or other action. *Mutual Life Insurance Company v. McGrew,* 188 U. S. 291, 23 S. Ct. 275, 47 L. Ed. 480 (1903). In this action, appellant raised the due process notice question relating to the Fourteenth Amendment of the Federal Constitution in a clear and timely fashion in a Motion For Summary Judgment made pursuant to Iowa Rule of Civil Procedure 237. This rule is based on the Federal Rule of Civil Procedure 56 governing summary judgments, and the Iowa courts have long held that the interpretation of the Federal rules are persuasive. *Sherwood v. Nissen,* 179 N. W. 2d 336 (Iowa 1970). The Iowa summary judgment rule, like the Federal one, permits the reviewing trial court to take into account certain facts beyond the pleadings including matters disclosed in discovery proceedings such as Answers to Request for Admissions, depositions and Answers to Interrogatories. *Brody v. Ruby,* 267 N. W. 2d 902 (Iowa 1978). In this action, the appellant utilized and relied on information obtained from all of these discovery devices in support of its Motion For Summary Judgment.

In making this Motion For Summary Judgment, the appellant urged to the trial court that Sections 633.40 and 633.389 as applied in giving notice to Della Vanderlinden violated the due process clause of the Fourteenth Amendment of the Federal Constitution. The trial court agreed that the method chosen violated due process provisions, but the Iowa Court of Appeals reversed this determination, finding the Iowa statutes valid both as enacted and as applied in this particular case in stating that the method used in providing notice complied with the due process standards previously established by this Court

in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 2d 865 (1950). Appellant had, of course, urged the trial court that the standards in *Mullane* were not met under the facts of this particular case.

This court has long held that when a state's statute is upheld as enacted and applied after a challenge based on a Federal constitutional ground, the right of appeal exists under 28 U. S. C. § 1257(2):

> *Japan Line, Ltd. v. County of Los Angeles*, 441 U. S. 434, 99 S. Ct. 1813, 60 L. Ed. 2d 336 (1979).
>
> *Huffman v. Pursue, Ltd.*, 420 U. S. 592, 95 S. Ct. 1200, 43 L. Ed. 2d 482, Reh. Den. 421 U. S. 971, 95 S. Ct. 1969, 44 L. Ed. 2d 463 (1975).
>
> *Fiske v. Kansas*, 274 U. S. 380, 47 S. Ct. 655, 71 L. Ed. 1108 (1927).

A state court's upholding of a state statute on due process grounds was, in fact, the basis of appellate review in *Mullane, supra,* and succeeding cases, including *Schroeder v. City of New York*, 371 U. S. 208, 211 83 S. Ct. 279, 281-282, 9 L. Ed. 2d 255, 258 (1962).

In making argument to the trial court, appellant relied on the authority of *Flanders v. Waterloo Community School District*, 217 N. W. 2d 579 (1974). Although the case specifically dealt with notice of termination procedures of a public school district employee, appellant had relied on it for the language found at 582 of 217 N. W. 2d in which the Iowa Supreme Court stated a general rule that when a statute or other provision does not expressly authorize notice by publication, mail or some other specified method, but requires the person to notify in writing or give written notice, then the method of trans-

mitting the writing to the recipient is not important, but the receipt of the writing by the one to be notified is essential. Moreover, the probate statutes which are in question in this present an even stronger case for written notice than the statute involved in *Flanders* which merely provided for mailing of notice; in that, probate statutes in question provide for *service* of notice. That an affidavit of mailing does not provide proof of *service* is clearly set out in *Harrington v. City of Keokuk,* 258 Iowa 1043, 1049-1050, 141 N. W. 2d 633, 637-638 (1966).

Appellant also contends that the Iowa Court of Appeals made a retroactive determination that notice under Section 633.40 need not be in writing. All of the above grounds make an appeal under 28 U. S. C. § 1257 (2) proper.

ARGUMENT POINT II.

This appeal presents a justiciable case or controversy.

Appellee has contended that this appeal does not present a justiciable case or controversy as is required by the United States Constitution in Article III, Section 2. This entire argument is based on the faulty conclusion that the burden of proof of service upon the ward in question is a task that necessarily rested upon the appellant. Appellant would stress that the statute in question involved an issue of service of notice, rather than merely making of a notice and that before the probate court could obtain jurisdiction, proof of service having been made was essential. That the burden of showing such proof of service rests upon the party relying on such service is a general rule of American Jurisprudence. 66 C. J. S. *Notice,* Sect. 21 (a) at 674, 58 Am. Jur. 2d *Notice,*

Sect. 32 at 513. Without such finding of notice having been properly given, any judgment is void, being without due process of law. *In Re Estate of Roedell,* 253 Iowa 438, 443, 112 N. W. 2d 842, 845 (1962); *Gray v. Lukowski,* 241 N. W. 2d 35 (Iowa 1976). It is, and always has been, appellant's position that nothing in the record of the probate court indicates that a specific finding of notice having been given to Della Vanderlinden was ever made. A portion of the language previously quoted in prior point of argument in *Harrington v. City of Keokuk, supra,* clearly shows that an affidavit of mailing does not provide proof of service of notice when service is required.

The Iowa Court of Appeals applied the presumption that receipt of a mailed notice by relying on the case of *Roshek Realty Co. v. Roshek Bros. Co.,* 249 Iowa 349, 356, 87 N. W. 2d 8, 13 (1957). That case involved receipt of a notice of written demand for a rent as per requisite to the claim of forfeiture of a lease. The present case, however, involves *service* of a notice in a probate court proceeding in which there was no provision by statute for mailing of notice. These factual dissimilarities between *Roshek* and the present case would make *Roshek* inapplicable as an authoritative precedent.

Moreover, the facts in this case show that only W. F. Vanderlinden picked up mail at the post office box he shared with Della Vanderlinden. Therefore, the only presumption that could be applied here was that he, as an agent of Della Vanderlinden, received mail. *Schutz v. Jordan,* 141 U. S. 213, 11 S. Ct. 906, 35 L. Ed. 705 (1890).

ARGUMENT POINT III.

The notice procedure prescribed by the court in the Della Vanderlinden conservatorship proceedings violated due process of law.

It is appellant's first contention that notice by ordinary mail was not permitted under Section 633.40 of the Iowa Probate Code at the time notice was ordered to be made upon Della Vanderlinden. Appellee argues that prior to 1972 when the law was changed allowing such procedure that such a practice was both common and accepted; however, this does not mean that such practice was lawful. In fact, prior decisions of the Iowa courts have long held that unless otherwise provided by statute, the service of a notice must be personal. *Harrington v. City of Keokuk,* 258 Iowa 1043, 141 N. W. 2d 633 (1966).

Appellant also has contended that notice given by ordinary mail because of circumstances presented by the uncontradicted evidence in this case is not of a type when such circumstances are considered reasonably calculated to apprise Della Vanderlinden of the pendency of the sale proceedings as was required by *Mullane v. Central Hanover Bank & Trust Co.,* 239 U. S. 306 (1950). Appellant contended that Della Vanderlinden's lack of mobility combined with the fact that mail was received at a box in which her husband, the adverse party in the probate proceedings, usually and customarily picked up the mail, constituted such circumstances so that one actually intending to appraise her of the notice of probate proceedings would have to rely on personal service rather than providing for notice by ordinary mail. The trial court,

in making its ruling, found that such circumstances clearly showed that due process in this case was not met under the *Mullane* standards. For all of the foregoing reasons, the Fourteenth Amendment due process issue exists for this court to consider on appeal.

ARGUMENT POINT IV.

Appellee's motion misstates the record.

At this juncture, appellant feels that it is incumbent to point out to this court that the appellee has misstated the record by trying to interject matters that were never before the trial court at the time of hearing or contrary to the facts of the record. The first matter that must be noted is the absence in the record of a specific finding by the probate court that notice had been given to Della Vanderlinden. The second matter is that the trial court, in making its ruling, never had any evidence that Della Vanderlinden knew of the pendency of the sale of her farm. Appellee tried to raise this in a Motion To Reconsider, which is not provided for in Iowa Practice and Procedure, after the ruling on a Motion For Summary Judgment; and appellant strenuously objected to the same in its appellate Brief. The testimony of the Guardian ad Litem indicated that he never made any contact with Della Vanderlinden to ascertain that she had actually received notice, but merely signed forms provided for him by the attorney for the conservatorship. The Order, from the probate court, however, clearly provided that Della Vanderlinden herself, whose competency is undisputed, was to receive notice.

ARGUMENT POINT V.

The Iowa Court of Appeals erred in deciding this case on the basis of collateral attack; and, moreover, such issue is not one independent from the federal issue of violation of the due process of law.

Appellant contends that the Probate Court judgment was void and that the sale allowed thereby can be attacked at any time. *Rosenberg v. Jackson,* 247 N. W. 2d 216, 218 (Iowa 1976). Appellant's attack was based on due process grounds alleging deficient notice. The Iowa Court of Appeals first considered this issue in its opinion. Thereafter, it ruled that this action was a collateral attack. It seems clear that these issues are inherently and entirely interwoven in the broader framework of the Federal Constitutional question of due process of law. When the non-Federal ground is so interwoven with the Federal, this court's jurisdiction on appeal is plain. *Abie State Bank v. Bryan,* 282 U. S. 765, 51 S. Ct. 252, 75 L. Ed. 690 (1931).

ARGUMENT POINT VI.

In the event the court finds that an appeal pursuant to 28 U. S. C. Section 1257 (2) is improper, appellant states that writ of certiorari pursuant to Section 28 U. S. C. 1257 (3) should be granted.

The holding of the Iowa Court of Appeals allowing for notice other than in writing presents a question of special merit and significant import. Moreover, the statutory change allowing mailed notice does not moot the Fed-

eral question of due process of law so as to conclude review either by appeal or certiorari, for the reason that even if ordinary mail has been authorized is a method of providing notice in the statute at the time Della Vanderlinden was given notice that under the circumstances which had been established by uncontradicted evidence, that even compliance with such statute would not have reasonably apprised Della Vanderlinden of the pendency of these proceedings and such was known to W. F. Vanderlinden, the party giving notice to her. *Robinson v. Hanrahan*, 409 U. S. 38, 93 S. Ct. 30, 34 L. Ed. 2d 47 (1972).

CONCLUSION

For the reasons set forth herein and for the reasons previously stated in his Jurisdictional Statement, appellant respectfully requests that this court note probable jurisdiction of this appeal; or in the alternative, request the papers whereupon this appeal is taken to be regarded and looked upon as Petition For Writ of Certiorari.

Respectfully submitted,

GALLAGHER, LANGLAS & GALLAGHER, P. C.

405 East Fifth Street
Waterloo, Iowa 50704
Tel. (319) 233-6163

By: EDWARD J. GALLAGHER, JR.
EDWARD J. GALLAGHER, III

MARTIN, KEITH & PEDERSEN

First Federal Savings Building
Waterloo, Iowa 50704
Tel. (319) 235-9212

By: MICHAEL M. PEDERSEN

Counsel for Appellant.